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Wellness Programs Continue to Face Compliance Challenges

By Joseph J. Lazzarotti on February 7, 2019

The rules for employer-sponsored wellness programs continue to be a moving target; most recently, regulations issued by the Equal Employment Opportunity Commission (“EEOC”) intending to address issues under the Americans with Disabilities Act (“ADA”) and the Genetic Information Non-Discrimination Act (“GINA”). Many employers are already well aware of the wellness regulations under the Affordable Care Act that for some years now have permitted incentives for certain health contingent programs, such as biometric screenings and tobacco cessation programs, in some cases allowing incentives of up to 50% of the applicable premium. But some of the same wellness incentives permissible under the ACA raise issues under the ADA and GINA. The EEOC tried to address some of those issues through regulation, but wound up losing in court against the AARP (formerly the American Association of Retired Persons) which challenged the EEOC’s methods for developing the regulations. So, we are basically back where we started, namely, what to do with wellness programs that are permissible with the ACA regulations, but may not be consistent with rules under the ADA or GINA (or programs that do not raise ACA issues at all, but still have compliance requirements under the ADA and/or GINA).

What’s the problem? We focus here on the ADA. In general, the ADA prohibits employers from subjecting employees to disability-related inquiries or medical examinations. One exception from this rule is that the inquiry or examination is part of a voluntary health program. However, the EEOC had not formally defined the term “voluntary” or explained what constitutes a “health program.” Thus, it had been unclear whether employers could offer incentives to encourage employees to participate in programs that involved such inquiries or examinations, something the ACA clearly permitted. The EEOC finally issued regulations to permit certain incentives for employees to answer disability-related questions or undergo medical examinations that would not cause the program to be involuntary. As noted, those regulations have been vacated.

EEOC modifies its regulations. On December 20, 2018, in response to the AARP decision, the EEOC revised its regulations to remove the incentives that had been permitted. What remains in the regulations presently is that a health program that includes disability-related inquiries or medical examinations (such as a health risk assessment or biometric screening) is voluntary as long as the program meets certain requirements:

- Employees may not be required to participate;
- The employer may not deny coverage or limit the extent of benefits under any of its group health plans or package options for employees who do not participate;
- The employer does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees; and
- The employer provides employees with a confidentiality notice that: (i) is understandable; (ii) explains the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and (iii) describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the HIPAA privacy and security regulations).

What remains unclear is whether offering an incentive to an employee to participate in a disability-related inquiry or medical examination as part of an otherwise compliant program would be viewed by the EEOC to be impermissible. Notably, prior to issuing its wellness program regulations, the EEOC had sued employers over the design of their health plans, including in cases where the programs appeared to be more consistent with typical program offerings and incentives.

Note that the EEOC made similar changes to its regulations under GINA that had permitted inducements to an employee for the employee's spouse to provide his or her current health status information as part of a health risk assessment administered in connection with an employee-sponsored wellness program. Employers should review their wellness programs carefully, and not just those that are tied to their group health plans, to see whether they are compliant with the ADA and GINA.

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